United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1036

In The

United States Court of Appeals

For The Second Circuit

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Docket No. 75-1036

UNITED STATES OF AMERICA,

-against-

MANUEL GONZALEZ,

Appellant.

BRIEF OF APPLELLANT MANUEL GONZALEZ

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UNITED STATES COURT OF APPEALS
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BRIEF OF APPELLANT MANUEL GONZALEZ

This is an appeal by the appellant, MANUEL GONZALEZ, from a judgment of conviction, after a jury trial, presided by District Judge Edward Neaher. #72 CR 1176-EDNY.

Gonzalez was convicted of importing cocaine into the United States (Count four) and of conspiracy to so import (Count one), in violation of 21 U.S.C. 952 (a), 963. He received a sentence of five years imprisonment, to be followed by a ten year special parole period. 1a.

He has been admited to bail pending appeal.

This is the second trial of this indictment. Gonzalez' first conviction was reversed by this Court because of both erroneous instructions

by the court to the jury and because of an improper prosecution summation. United States v. Gonzalez, 488 F2d 833 (CA-2, 1973). In addition this Court noted there had been an erroneous restriction upon the cross-examination of the accomplice witness Correa, footnote 2,488 F2d at 835, and that the district court would have followed a "wiser course" if it had granted the defense motion to take the deposition in Chile of Mario Menna. 488 F2d at 838-839.

Co-defendant Jose Correa pleaded guilty, and testified for the defense. At the trial he conceded he had pled guilty, though he referred to his pending appeal from the denial of his motion to vacate the plea. R. 904; also see fn. 1, 488 F2d at 835. Subsequently this Court did sustain his appeal, and did vacate his plea of guilty. United States v. Irizarry, slip opinion page 899, CA-2, #74-1866, 12/19/74.

THE INDICTMENT

Count one recites:

> "On or about and between the 1st day of September 1972, and the 9th day of October 1972,both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOSE VALENZUELA-CORREA, MANUEL GONZALEZ and JOHN DOE, also known as "Mario C.", did conspire to commit an offense against the United States in violation of Title 21, United States Code, Section 952 (a) by conspiring to import into the United States from a place outside thereof a quantity of Cocaine Hydrochloride, a

Schedule II narcotic drug controlled substance. (Title 21, U.S.C., Section 963)

Count four recites:

"On or about the 1st day of September 1972, and the 9th day of October 1972, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOSE VALENZUELA-CORRERS, MANUEL GONZALEZ and JOHN DOE, also known as "Mario C.", did knowingly and intentionally import into the United States from a place outside thereof, a quantity of Cocaine Hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21 U.S.C., Section 952 (a) and Title 18, U.S.C., Section 2).

STATUTES INVOLVED

21 U.S.C. 952 (a) recites in part:

"It shall be unlawful to import into the customs territory of the United States from any place outside thereof... any controlled substance in Schedule I or II of subchapter I of this Chapter, or any narcotic drug in Schedule III, IV, or V of subchapter I of this chapter...".

21 U.S.C. 963 recites:

"Any person who attempts or conspires to commit any offense defined in this subschapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

THE GOVERNMENT'S CASE

The government's evidence at the second trial was substantially similar to the evidence at the first trial. As we do not raise the issue fn. as to the sufficiency of the evidence, we direct the Court's attention to the summary of the evidence, as stated by Judge Smith, in the opinion of this Court reversing the earlier conviction (488 F2d at 834-835):

> "The principals of this case first came to the attention of the authorities when on October 7, 1972, Jose Valenzuela-Correa, a sixty-three year old Chilean national, was searchec following his arrival in the United States from Chile at John F. Kennedy International Airport in Queens, New York. He was found to have over four pounds of cocaine strapped to his legs. Correa agreed to cooperate with the authorities and stated that he was an intermediary between Mario Cerda, a business acquaintance of Correa's in Santiago, and a Mr. Gonzalez, whose address was 1511 Westchester Avenue, Bronx, New York. Correa stated that Cerda had given him an envelope which Correa was to give to Gonzalez along with the drugs. Upon inspection the letter was found to be a letter of introduction, referring to Correa as "the bearer of your order." It also spoke of future orders but did not identify any of these "orders" as involving narcotics. The envelope also contained the halves of two different dollar bills cut in a zig-zag manner. Correa told customs officials that Cerda had instructed him not to deliver the drugs until he was shown the corresponding halves of the bills and that Cerda told him that Gonzalez would give him $300 in expense money at their initial meeting.

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fn. Sufficiency was not raised at the initial trial. 488 F2d at 835.

Correa's subsequent meetings with appellant Gonzalez on the night of October 7, at a bar owned by Gonzalez at the Westchester Avenue address, was under surveillance by special agents. The officers observed Gonzalez greet Correa, look briefly at the letter Correa gave him, and walk to the rear of the bar where Gonzalez disappeared from view. A short time later, an agent who pretended to be using the bathroom saw appellant speaking with a black man and giving him a sum of money. Gonzalez then stood in the rear of the bar, apparently reading from a piece of paper. Appellant next returned to Correa and gave him the matching halves of the bills contained in the envelope. Correa testified that Gonzalez then advised him that an individual would pick up the cocaine the next day at Correa's room in the Yonkers Motor Inn. Correa asked Gonzalez for the expense money, and Gonzalez gave him $300. The surveilling agents testified to all the above, except the conversation between Correa and Gonzalez.

The first arrest in this case was made when Bolivar Irizarry came to Correa's room the next day. Irizarry showed Correa the same halves of the bills that Correa had given Gonzalez the day before and also presented to Correa a Yonkers Motor Inn card that Correa had given Gonzalez. When Irizarry began examining the cocaine, the special agents emerged from the bathroom and placed him under arrest. Appellant Gonzalez was arrested outside his bar later that day. Mario Cerda was named in the indictment as "John Doe,also known as Mario C.".

The government did not offer any evidence seized as a result of a search of Gonzalez, nor did the prosecution offer any statements made by Gonzalez at the time of his arrest.

Nor could the government offer as against Gonzalez any statements made by Correa to the federal agents anytime after his arrest when his role as a conspirator ended, and he adopted the new role of cooperation

with the government. United States v. Fiswick, 329 U.S. 211 (1946). R. 746.

THE DEFENSE CASE

The defense presented a substantial case, which included reputation witness, (R. 792-875, 881-887), and the defendant himself (R. 1050-1154). Also co-defendant Bolivar Irazzary testified for the defense (5a-11a), as did Gonzalez' optometrist, who testified that Gonzalez was just unable to read the contents of the letter in question (Exhibit #8). R. 978-987.

In its opinion reversing the earlier conviction, this Court summarized Gonzalez' testimony, as follows (488 F2d at 835):

> "The defense claimed that Gonzalez believed the transaction involved shoes, not cocaine. Appellant testified in his own behalf that in February, 1972, he and Mario Mena Flores, a Chilean national who frequented Gonzalez' bar, had agreed to begin marketing in New York shoes which Flores made in Chile. Gonzalez and Flores further agreed that one Ricardo Gonzalez, apparently no relation of appellant's, was to be a partner in the venture and that Flores would send a shipment of shoes to New York as a sample. Appellant testified that Ricardo Gonzalez told appellant one week before Correa's arrival in New York that Fores would soon arrive in New York. Appellant contended that Correa introduced himself as being sent by "Mario," whom appellant took to be Mario Flores, that appellant showed the letter Correa gave him to Ricardo Gonzalez when appellant went to the rear of the bar and that Ricardo Gonzalez gave appellant the two halves of the dollar bills, telling him that they belonged to Correa. Appellant also testified that he gave Correa's motel card to Ricardo

Gonzalez who said that he would pick up the shoes. Appellant denied having discussed narcotics with Correa and stated that he had not seen Ricardo Gonzalez since the night of October 7 although he had tried resourcefully to contact him."

Gonzalez testified that he was the Republican district leader of the 79th assembly district in the Bronx (Hunts Point, Soundview area). R. 1057. Of course he had never been convicted of a crime, and he was the owner of Manny's Lounge since 1956. R. 1052, 1051.

Dr. Stefan Miller, an optometrist, testified he examined Gonzalez' eyers on July 9, 1970 and again on November 9, 1972 (the events in question occurred October 7, 1972 - just one month earlier). Dr. Miller testified that in November 1972 Gonzalez could not read the letter (Exhibit 8) without glasses. R. 987.

Co-defendant Bolivar Irizarry testified that he was sent by another, not by Gonzalez, to the Yonkers Motor Inn on October 8th to pick up a package. 11a. Furthermore, when both Gonzalez and Irizarry were together at federal headquarters, Irizarry told the agents that Gonzalez was not the man who had sent him. 10a,R. 318. At the trial Irizarry conceded he had pled guilty. 52. Subsequently his plea was vacated by this Court. #74-1866, 12/19/74, slip opinion page 899.

In its cross-examination of Gonzalez, the government improperly

attempted to link together Bolivar Irizzary and Gonzalez, through an unfair reference to a Tony Irizarry, whose name appeared in Gonzalez' telephone book (23a):

"Q. Does the name Irizzary appear in that telephone book under the I's?

A. Irizarry is a common name. There is a Tony Irizarry who owns a bar called La Bahia.

Q. Isn't he related to Bolivar Irizarry?

A. I don't know, but I never saw them together.

Defense counsel promptly demanded that the prosecution make a factual showing as a basis for asking that question (23a, 24a, 25a, 26a):

MR. DI RENZO: "Mr. Dawson, will you make a representation that they are related and you know them to be related?"

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MR. DAWSON: "I have been told by one of the agents on the case who was pursuing some investigation regarding Irizzary... they photostated the book, the defendant's address book, and the name Irizarry, Antonio Irizzary, was there, they checked preliminarily and they heard some word that he was a cousin of Antonio Irizaary..

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"I cannot say that I know for an absolute fact that Tony Irizzary is related but that was the information."

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MR. DI RENZO: "What I am concerned about is when he asked the question about Irizzary, he is talking about somebody who is supposed to be a distant cousin or a cousin to Bolivar Irizzary who was on the stand. I think that it is extremely prejudicial, unless he has some real basis to show the connection, because there are many Spanish names alike, Gonzalez, Rodriguez, Irizarry. The point is this is a crucial part of the case. That puts him close to Irizarry."(emphas added)

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MR. DI RENZO: "It is not a question of him being related. There is some talk that he might be. You are saying that right here. When you ask that question you knew that and you had no positive proof that they were related. I think that was very prejudicial."

At this point defense moved for a mistrial, which the Court denied.

27a.

The defense was unable to secure the testimony by deposition of Mario Menna, which testimony the defense was prepared to offer as corroboration of Gonzalez' testimony that his business dealings with Mario were solely with regard to the importation of shoes, and were not concerned with any illegal activities. At the first trial the district court had denied Gonzalez' motion to take the deposition in Chile of Mario Menna. Harry Hammer, Esq., one of the defense counsel at the first trial, had previously interviewed Mario Menna in Chile, and had produced in court an affidavit stating that he would be willing to be deposed; he was un-

willing to come to the United States; and that he would give testimony that he was engaged in the business with Gonzalez of importing shoes into the United States from Chile. 65a-75a.

In its prior opinion the Court of Appeals noted that while Judge Constantino had probably acted within the scope of his discretion in denying the application to depose Mario Menna, "We believe the wiser course would have been to grant the motion". 488 F2d at 838.

Following the reversal of the initial conviction, and the re-assignment of the second trial to Judge Neaher, the defense renewed the application to depose Menna, which motion the Court granted. Unfortunately, by this time, Mario Menna had disappeared from his usual place of business and residence, and could no longer be found by the defense. Actually the government did help the defense in an effort to locate Menna, but without success. 3a-4a.

The defense produced Harry Hammer, Esq. in court with the expectation that he would testify to efforts made to locate Menna. 12a. the trial judge was not interested in hearing his testimony, but was willing to incorporate the motion papers and the various affidavits which were submitted prior to the first trial as part of the trial record at this time. 16a-17a. Both the Court and the government counsel noted that the Chilean police and two FBI agents had made efforts to locate Menna. 18a-19a, 61a-64a.

As such the defense was compelled to go to trial without the testimony of Menna, whose testimony by deposition could have been available at the first trial if Judge Constantino had ruled properly on the deposition application.

POINT I

THE PROSECUTION ACTED IMPROPERLY AND ERRONEOUSLY WHEN, IN CROSS-EXAMINATION OF THE DEFENDANT, IT TRIED TO TIE HIM TO CO-DEFENDANT IRIZARRY ON THE BASIS OF AN ASSUMED FACT FOR WHICH IT DID NOT HAVE A FOUNDATION

Apparently Gonzalez had the name Irizarry in his telephone address book. He admitted that fact on cross-examination, and stated that the full name of the person in question was Tony Irizarry, who owns a bar called La Bahia. Then government counsel, in an effort to tie together Gonzalez, Tony Irizarry, and co-defendant Bolivar Irizarry, asked Gonzalez whether Tony Irizarry was related to Bolivar Irizarry. (23a):

"Q. Isn't he related to Bolivar Irizarry"

A. I don't know, but I never saw them together."

At that point defense counsel demanded that the government make a showing that they had in fact some basis for asking that question. 23a. The government's answer was vague and indefinite-"...they checked preliminarily and they heard some word that he was a cousin of Antonio

Irizarry..."24a.

After some colloquy, in which the government could not make a better showing, the defense moved for a mistrial, which application the Court denied. 27a.

We must recall that the evidence did not show any contact whatsoever between Gonzalez and Irizarry. The evidence showed that Correa visited Gonzalez at his bar one day, and on the next day Irizarry appeared at the Yonkers Motor Inn. Gonzalez was never seen at the Yonkers Motor Inn, nor was Irizarry ever seen at Gonzalez' bar. As such in order to tie the two together, the government wanted to show either some contact or some relationship. The government just had no evidence on that score. As such the government attempted to show through the name Antonio Irizarry, that Bolivar Irizarry was related to him; and that Tony Irizarry's name appeared in Gonzalez' telephone book.

The government just had no basis for vouching that as a matter of fact the two Irizarrys were related. Nevertheless, government counsel phrased the question to Gonzalez in an affirmative manner so as to insinuate to the jury that it was a matter of fact. 23a.

"Q. Isn't he related to Bolivar Irizarry?" (emphasis added)

The government did not phrase the question in a neutral manner

such as - do you happen to know whether or not he is related to Bolivar Irizarry? The government asked the question in an affirmative manner, presupposing a positive answer ' "Isn't he related to Bolivar Irizarry"? (emphasis added) Obviously any tie-in, by blood, marriage, or business relationship would be extremely helpful to the government.

The law is quite clear that in cross-examination, counsel may not phrase a question in such a menner as to utilize a set of facts, for which they have no foundation. This error becomes especially prejudicial when, in the context of a criminal case, it is the prosecution examining the defendant himself. Standard 5.7 (d) of the American Bar Association Standards relating to the prosecution function states:

> "It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner cannot support by evidence".

In United States v. La Sorsa, 480 F2d 522, 529, (CA-2, 1973, this Court stated that a question on cross-examination may not assume an unsubstantiated fact - "We agree with the government that this ruling was correct as the question assumed an unsubstantiated fact". 480 F2d at 529.

Likewise, in United States v. Landers, 484 F2d 93, 95, (CA-5, 1973), the Fifth Circuit held it was improper to cross-examine a prosecution witness about a subject for which there was no foundation - "the question contained a conclusion about a "deal" when no supporting facts

had been introduced by any such agreement with the government." 484 F2d at 95.

Again, in United States v. Mullins, 487 F2d 581, 590 (CA-8, 1973), the Court of Appeals for the Eighth Circuit held improper a defense questioning of a prosecution witness when there was just no foundation for that question. The Court of Appeals stated, "The government argues that defendant did not establish proper foundation to demonstrate that Ludtke was a competent person to know this information, and defendant does not contest this response by the government in his reply brief. Not only is the government's position correct that no proper foundation for Ludtke was demonstrated...". 487 F2d at 590.

POINT II

THE INITIAL ERROR OF JUDGE CONSTANTINO, PRIOR TO THE FIRST TRIAL, IN DENYING THE DEFENSE APPLICATION TO TAKE THE DEPOSITION OF AN IMPORTANT PROSPECTIVE DEFENSE WITNESS, EFFECTIVELY DEPRIVES THE DEFENSE OF SECURING AND OFFERING HIS TESTIMONY AT THE SECOND TRIAL

In its initial opinion, this Court noted that Judge Constantino had not acted wisely when he denied the defense application to take the deposition in Chile of Mario Menna - "We believe the wiser course would have been to grant the motion". 488 F2d at 838.

Prior to the time of the first trial Menna had been available for deposition. Harry Hammer, Esq., one of the defense attorneys at the first trial, had travelled to Chile, and had interviewed Mario Menna. Menna had told Hammer that he was available for deposition, and that he was prepared to testify in a manner which may have exculpated Gonzalez.65a-75a. In this regard the Court of Appeals had stated (488 F2d at 838):

> "Shortly after his arraignment, appellant made a motion pursuant to Rule 15 (a) to take the deposition abroad of "Mario Menna." As noted, appellant has contended throughout that he, Ricardo Gonzalez and Mario Mena Flores were engaged in a retail shoe venture. In affidavits in support of his Rule 15 (a) motion, appellant stated that "Menna" was Mario Mena Flores and that Flores was willing to be deposed but unwilling to travel to the United States to testify. Appellant's affidavits further stated that Flores had told defense counsel in Chile that Flores and appellant were planning a retail shoe business, that Flores had given Correa a letter of introduction to appellant, but not one that later was introduced at trial."

Unfortunately for the second trial, neither the defense nor the government could locate Mario Menna in Chile. Both the defense and the government conceded that each had made efforts to locate Menna. 13a, 18a, 19a, 61a-64a.

As such we have the unfortunate situation where Menna's deposition could have been available for the first trial, if the district court had correctly so directed it at that time, and now where his deposition is just not available for the second trial, inspite of the order

of the district court permitting such a deposition. Obviously if the deposition had been available at the first trial it would have been available for the second trial. The defense at the second trial was necessarily prejudiced by the ruling of Judge Constantino at the first trial when he declined to order the deposition. This Court noted in its opinion that Judge Constantino had not pursued "the wiser course".

The Sixth Amendment deals with the right of a defendant to compel by subpoena, the testimony of any witness who may be able to give testimony helpful to the defense. Obviously the subpoena power of the district court does not extend to a foreign national residing in a foreign nation. The use of a deposition, pursuant to Rule 15, is in line with the Sixth Amendment right of a defendant to secure testimony from whatever source and wherever located. The confrontation requirement is met my requiring that the prosecution participate in the deposition.

Counsel has just not found any cases on point dealing with the unavailability of a witness to be deposed for a second trial, when in fact that witness was willing and available to be deposed for the first trial. By analogy, I refer to the opinion of this Court in United States v. Mosca, 475 F2d 1052, 1058-1060 (CA-2, 1973), in which this Court made it clear that neither the government nor the district court should do anything to make unavailable the testimony of a prospective defense witness. In

Mosca the defense eventually secured a deposition, which both the district court and this Court was able to study to determine its possible impact. In our case we never did get the deposition because of the initial error of Judge Constantino on his ruling denying the deposition.

Judge Neaher's corrective ruling prior to the second trial just was not able to salvage the situation.

CONCLUSION

The judgment should be reversed, and a new trial directed.

Respectfully submitted,

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